

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

76-2107

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
JULIUS F. KLEIN,

Petitioner-Appellant,

-against-

HAROLD SMITH, as Superintendent of the
Attica Correctional Facility, Attica,
New York,

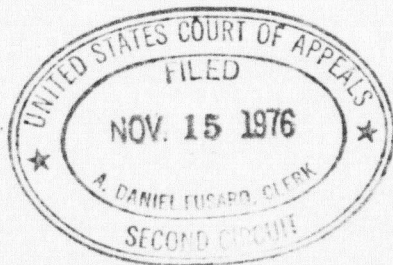
Respondent-Appellee.
-----X

No. 76-2107

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

APPENDIX

B
P/S



LAWRENCE W. KESSLER
Attorney for Appellant
Hofstra Law School
Hempstead, New York 11550

516-560-3216

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CIVIL DOCKET
UNITED STATES DISTRICT COURT

JUDGE OWEN

73

CIV. 3:42 3 6

Jury demand date:

C. Form No. 106 Rev.

TITLE OF CASE

ATTORNEYS

JULIUS F. KLEIN, JR.

VS

HAROLD SMITH, as Superintendent of the
Attica Correctional Facility,
Attica, New York

For plaintiff:
Bobick, Deutsch & Schlessner
149 West 72nd St
NYC 10023 TR 3-7063

For defendant:

STATISTICAL RECORD

COSTS

S. 5 mailed

x

Clerk

S. 6 mailed

✓

Marshal

Basis of Action:

Docket fee

Writ of Habeas Corpus

Witness fees

Action arose at:

Depositions

DATE

NAME OF
RECEIVING OFFICE

REC.

FILED

7/1/73 Bobick, D.
10/1/73 U.S. P.
7/2/74 Bobick, D.
7/7/74 U.S. P.
11/13/74 Bobick, D.
11/13/74 U.S. P.
8/18/76 U.S. P.
8/19/76 U.S. P.

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73 CV. 4277

JUDGMENT

DATE	PROCEEDINGS	Date Order Judgment Not
Oct. 9-73	Filed petition for Writ of Habeas Corpus	
Oct. 10-73	Filed affdvt and notice of motion for petitioner Re Temporary Transfer Ret 10 19 73	
Oct. 10-73	Filed petitioner's Memorandum of Law	
Oct. 10-73	Filed petitioner's Show Cause Order Re Writ of Habeas Corpus etc Ret 10 19 73	
Nov. 8-73	Filed Petitioner's supplemental memorandum of law.	
Nov. 16-73	Filed Supplemental memorandum of law on behalf of the people of the state of New York by the District Attorney of Suffolk County as an intervening party in opposition to petitioner's supplemental memorandum of law.	
Dec. 12-73	Filed Memo. End. on Petitioner's Motion dated on 10/10/73. Motion granted in accordance with memorandum decision filed herewith. Ward J.	
Dec. 12-73	Filed Memo. End. on Petitioner's motion dated on 10/10/73. OFS. Motion denied in accordance with memorandum decision filed herewith. Ward J.	
Dec. 12-73	Filed memorandum Decision. Ordered motion compelling petitioner's presence is granted. The motion to compel his transfer to another facility is denied. (mailed notice)	
Dec. 12-73	Filed Affidavit in opposition by Joel Lewittes to petitioners motion seeking transfer incarcerated.	
Dec. 12-73	Filed Affidavit in opposition to application for writ of habeas corpus & motion for change of place of incarceration.	
1/1/74	Reassigned to Owen, J.	
Jan 22-74	Mailed notice of reassignment.	
1/25/74	Pre-trial before Owen, J.	
1/25/74	Filed Order of the State Dept. of Correction, etc. produce & deliver said petitioner Julius E. Klein Jr. to US Marshall on 3/15/74. Owen J. (mailed notice)	
Apr 8-74	Filed Judicial Subpoena Duces Tecum to Suffolk County Jail, 1000 Drive, Riverhead NY 11901 - produce all records of visits by attys, etc. Owen J. (mailed notice)	
Apr 22-74	Filed writ of Habeas Corpus Ad Testifier named Charles Luchetti, 1010 1st St. Penitentiary Nashville Tenn. under custody that you are the brother of Charles Luchetti on 3/25/74 in the Southern District Court at 10 10 10. Etc. Owen J.	
Apr 25-74	Before Judge Owen Hearing begun	
Apr 26-74	Before Judge Owen Hearing continued & adjourned until 4/1/74 at 2 P.M.	
Apr 15-74	Filed Petitioners Notice of Motion. Re; Relief. ret. 4/19/74.	
Apr 16-74	Filed Memo. End. on Order to Show Cause dated 4/15/74, unsigned, I decline to sign this order. Owen J. (mailed notice)	
Apr. 23-74	Filed affdvt of John M. Lockwood in opposition to petitioners's motion.	
Apr. 23-74	Filed reply affdvt of Melvyn Schlessler to the affdvt in opposition submitted by John M. Lockwood.	
Apr. 23-74	Filed memo endorsed on motion filed 4-15-74--This motion is denied in accordance with the minutes. So Ordered--Owen, J. Mailed notices.	
May 1-74	Filed Pet'n affdvt & notice of motion to amend Writ of Habeas Corpus-Ret. 5-11-74	
May 3-74	Filed Petitioner's Notice of Appeal from order of 4/16/74. (mailed notice)	
May 14-74	Filed John M. Lockwood affdvt in opposition to motion returnable May 13, 74.	
May 14-74	Filed Brief on behalf of the People of the State of New York, Intervening respondent and as atty for respondent by permission of the United States District Court.	
Jun 19-74	Filed True Copy of USCA Mandate Ordered that the appeal from the Judgment of the SDNY is dismissed. (mailed notice)	
Sep. 18-74	Filed true copy of order dated 3-8-74 with marshal's return-Writ satisfied 4-11-74-Owen, J.	

Page #3.

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date Order Judgment
Sep. 19-74	Filed true copy of U.S.C.A. order-Petition for a writ of mandamus having been filed. Upon consideration thereof, it is Ordered that said petition be and it hereby is denied.	
Oct 15-74	Filed Opinion #41308. Ordered For all the foregoing reasons, the petition is dismissed in its entirety. So Ordered Owen J. (mailed notice)	
Oct 17-74	Filed Petitioner's Notice of Motion & supporting affidavit. Re: Further relief. ret. 11/1/74.	
Nov. 13-74	Filed Certificate of Probable Cause permitting the petitioner to proceed with an appeal from the denial of a Writ of Habeas Corpus solely upon the issue of violation of his 7 amendment right to the effective assistance of counsel-Owen, J.	
Nov. 13-74	Filed Petitioner's notice of appeal from order dated 10-15-74 denying Petitioner's Writ of Habeas Corpus. Mailed notice to District Atty. of Suffolk County, Griffing Ave. Riverhead N.Y. Att: Mr. Lockwood, Asst. District Atty.	
Nov. 15-74	Filed affdvt of Melvyn Schlessler in reply to the affdvt of David Clayton.	
Nov. 25-74	Filed Petitioner's affdvt & notice of motion for an order to appeal in forma pauperis. Ret. 12-6-74.	
Dec. 20-74	Filed memo endorsed on motion filed 11-25-74-Motion granted on this record. So Ordered--Owen, J. Mailed notices.	
Dec. 23-74	Filed notice of certification & transmittal of original record on appeal this date.	
Jan. 13-75	Filed notice of certification & transmittal of supplemental record on appeal to the U.S.C.A. this date.	
Jan. 8-75	Filed pet'n memorandum in support of motion to re-open hearing.	
Apr 23-75	Filed affidavit & notice of motion of E. Thomas Boyle, Legal Aid Society, for permission to withdraw as attorney for petitioner, ret. 5-2-75.	
Apr. 25-75	Filed true copy of U.S.C.A. order-Motion to withdraw appeal from the U.S.D.C. S.D.N.Y. without prejudice is granted. Mailed notices.	
05-23-75	Filed Order-that petitioner being indigent, a stenographic transcript of the proceedings be prepared at the expense of the United States.....Owen, J.	
Jun 4-75	Filed memo endorsed on motion filed 4-23-75--Motion granted-So Ordered-Owen, J.	
Jun 13-75	Filed memo endorsed on Writ (unsigned) I decline to sign this order. Counsel was in the interim been assigned. Owen, J.	
Jul 14-75	Filed Affidavit of Paul T. Rogers, in support of the application of the petitioner for enlargement on bail in the above case etc, as indicated.	
Jul 21-75	Filed Petitioner's Affidavit & Application for order directing that petitioner be admitted to bail pending final disposition of all proceedings presently pending, etc, as indicated.	
03-08-76	Filed Petitioner's affidavit in support of motion to reopen hearing.	
04-13-76	Filed Petitioner's affidavit & notice of motion to reopen hearing in his habeas corpus action, ret. 4-30-76.	
04-13-76	Filed Petitioner's memorandum of law in support of motion to reopen hearing.	
04-19-76	Filed Respondent's affidavit in opposition to Petitioner's motion to reopen hearing.	
05-19-76	Filed Memo End on Pltff's, unsigned order. I decline to sign this order...Owen, J. (mailed notice)	
06-22-76	Filed Memo End on Pltff's, unsigned order. I decline to sign this order...Owen, J. (mailed notice)	
07-26-76	Filed transcript of record of proceedings dated 5-27-76.	
08-04-76	Filed CJA Form 21 Copy 5 appointing Vision Investigations, Inc. as investigators for Pltff., dated 7-13-76.....Owen, J.	
08-04-76	Filed CJA Form 21 Copy 2 approving payment to Vision Investigations, Inc., dated 7-13-76.....Owen, J.	
08-19-76	Filed Order granting petitioner a certificate of probable cause for purpose of appeal.....Owen, J. (mailed notice)	
08-18-76	Filed Petitioner's notice of appeal from the order denying petitioner's application for a Writ of Habeas Corpus entered on 7-20-76. (mailed notice)	

-over-

DATE	PROCEEDINGS	Date Order Filed
08-26-76	Filed petitioner's affidavit & notice of motion for leave to appeal in forma pauperis.	
08-26-76	Filed Order permitting Petitioner to proceed on appeal in forma pauperis.....Owen, J. (mailed notice)	
9-1-76	FILED TRANSCRIPT OF RECORD OF PROCEEDINGS DATED 7-13-76.	
9-1-76	FILED TRANSCRIPT OF RECORD OF PROCEEDINGS DATED 7-21-76.	
9-14-76	Filed transcript of proceedings dated March 25, 26, April 1, 9, 1974.	
09-21-76	Filed CJA Form 20 Copy 5 appointing Michael Mendelsohn as attorney for Deft., dated 7-19-76,.....Owen, J.	
09-21-76	Filed CJA Form 20 Copy 2 approving payment of Michael Mendelsohn, dated 9-13-76,Owen, J.	
09-21-76	Filed affidavit of Lawrence Kessler in support of application pursuant to 18:3006A for payment of Mr. Marchesi's services in the amount of \$288.00.	
09-21-76	Filed notice of certification & transmittal of the record on appeal to the U.S.C.A.	
10-7-76	Filed memo endorsed on CJA voucher....Application pursuant to 18USC 3006A A for XXXXX payment for private investigator to serve subpoenas on witnesses denied..... Counsel should have sought authorization of CT before committing USA to expense.....So Ordered XXXXX Owen J.	
10-07-76	Filed supplemental certificate of probable cause Owen J.	
10-8-76	Filed transcript of the record of proceedings dtd may 27, 1976	
10-8-76	Filed transcript of the record of proceedings dtd June 18, 1976	
10-8-76	FILED NOTICE TO DEBIT CLERK THAT RECORD TRANSMITTED TO C.A.	

ORAL FINDINGS OF FACTS AND CONCLUSIONS OF LAW

24

THE COURT: I disagree with you. I think

25

that the only issue that is really open here. This is a

1 hbju

2 reopening of a hearing that went on extensively to which
3 the Court gave enormous consideration after hearing all
4 the principals.

5 You have made a motion to consider, to
6 consider that hearing based upon what this gentleman
7 could say. He has said nothing.

8 The only question is whether I should
9 the basis of the operative nucleus of facts in an
10 his testimony whether I should do anything about
11 prior ruling.

12 That is all that is up here at this point
13 is whether anything that I have heard in our four or
14 five sessions here together should cause me to change
15 the view that I earlier had.

16 Quite frankly, Mr. Kessler, the only thing
17 that this case has gotten down to is to whether or not
18 there is enough here bearing upon Mr. O'Gorman's believability
19 to warrant giving any consideration to this at all. The
20 farther we get into this case in my judgment, the worse
21 Mr. O'Gorman's believability gets.

22 I don't know how carefully you read Court's
23 Exhibit 2, but Court's Exhibit 2 in my judgment is a
24 devastating instrument indicating that Julius Klein in
25 rather than a letter in which he was outlining his defense

1 hhjw

2 witnesses and those who would put him somewhere else,
3 that Julius Klein's letter that was torn up allegedly
4 was an instrument in which he was coaching various people
5 as to what to say to provide him with an alibi.

6 One of the sheets that you did not offer in
7 evidence here.

8 MR. KESSLER: Only because I did not read
9 it.

10 THE COURT: I called it to your attention
11 earlier.

12 Stole a letter from Klein outlining the
13 murder of Brandt.

14 This is O'Gorman's particular list of all the
15 various things that he did.

16 MR. CLAYTON: Your Honor, I am sorry, I was
17 under the impression that the Court had received as
18 Court's Exhibit 1 that whole packet.

19 THE COURT: I did. But Mr. Kessler
20 only offered in the very first group of that packet. I am
21 pointing out that as part of that packet there is that
22 statement on page 18 of the packet which goes on
23 extensively, he is setting up an alibi, certainly a reason-
24 able person can read it no other way, setting up an alibi
25 for somebody coming into a saloon with bloody clothes and

1 hbjw

2 saying what am I going to do about them. Who is going
3 to help him out with this alibi, so on the contrary, I
4 find that this exhibit aside from the first two pages where
5 he said Julie was framed, the balance of that exhibit is
6 exactly to the contrary, and is a devastating instrument.

7 MR. KESSLER: Your Honor, if I may, that is
8 part of the reason I wish to present to the Court this
9 information.

10 THE COURT: But I don't find that there is
11 enough there even given what I am sure is your best argument.

12 MR. KESSLER: Page 15 says that Mr. O'Gorman
13 wore a body recorder when he talked to Mr. Bobick.

14 THE COURT: I know, but all we have is this
15 piece of paper. Certainly given the credibility of this
16 man, Mr. Kessler, I am certainly not going to overturn a
17 murder trial where he won't say anything and every indicia
18 that I have here goes to the destruction of his credibility.

19 Mr. Klein, Sr., apparently in an affidavit --
20 I have forgotten.

21 In any event, page 4 of your affidavit to
22 me, Mr. Klein, Sr. has received a lengthy letter which
23 in effect was setting up the people who were able to
24 put him somewhere else.

25 I find that Mr. O'Gorman's written statement,

1 hbjw

2 Exhibit 2, Court's Exhibit 2 at page 18 contradicts that
3 in no uncertain terms.

4 MR. KESSLER: Your Honor --

5 THE COURT: Rather than those who anticipated
6 testimony, it is a counseling of perjury to give himself
7 a defense.

8 MR. KESSLER: That is anticipated testimony,
9 your Honor, though it is illegal it is still anticipated
10 testimony.

11 THE COURT: I know, but I have to determine
12 whether there is anything here permitting me to open up
13 this hearing.

14 MR. KESSLER: Your Honor, if Mr. O'Gorman
15 acting for the prosecutor's office intercepted that
16 letter, and in other ways took information from Mr. Bobick
17 to the prosecutor, no matter what Mr. Bobick and Mr.
18 Klein may have been planning and no matter how scurrilous
19 their activities may have been, if the Court is ready to
20 believe that that information was transmitted, that is
21 whether the letter had to do with a fraudulent defense
22 based upon perjurious testimony, or whether it was a
23 legitimate defense, if the government interceded in this
24 defense, I believe that that does violate Mr. Klein's
25 rights.

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1 HBJW

2 THE COURT: You would be right if that
3 were proved, but I am certainly not going to deem that
4 proved by reason of any writing of this gentleman's that
5 is not the subject of sworn testimony and not subject to
6 cross examination.

7 The more I get into it, the more I conclude
8 that this gentleman's testimony is not credible, is not
9 believable and consequently, even -- we never do get to
10 what he says and already I am confident that whatever he
11 would say is not believable.

12 Having arrived at that conclusion, I do not
13 see that there is a basis for me to change my initial
14 view after an extensive hearing, hearing all of the
15 principals.

16 In addition to that, we have Mr. Jaffe who
17 came here and testified, Mr. Julius Klein gave an affidavit
18 in which he said Mr. O'Gorman said this, that and the
19 other.

20 Mr. Jaffe says in no way, he didn't say this,
21 he didn't say that, he didn't say the other thing. I
22 don't remember him saying this at all. Certain things
23 he was very cautious in his testimony, a couple of times
24 I said you have been told that Mr. Nadjari had told him
25 to go speak to a judge and lie to a judge, you would

1 hbjw

2 remember that and he said of course I would, which I am
3 sure you or I would.

4 This is all peripheral again but it has to
5 do with the essential credibility of the man and given
6 that credibility, why should I credit this statement or
7 his telephone conversation with Mr. Silvestri?

8 MR. KESSLER: Your Honor, I believe the
9 reason is that the fact that Mr. O'Gorman did not make
10 affirmative statements to Mr. Jaffe, the fact that he
11 subsequently refused to cooperate with Mr. Jaffe in terms
12 of a Drug Enforcement Agency investigation, those factors
13 which led Mr. Jaffe to believe that he was unreliable for
14 Mr. Jaffe's purpose, does not relate to the fact that
15 your Honor now has a document written by Mr. O'Gorman and
16 has heard a telephone conversation made by Mr. O'Gorman
17 under conditions in which there obviously is no motive of
18 self-benefit for Mr. O'Gorman, that is, he certainly
19 was getting nothing out of a telephone conversation with
20 a man whom he thought was his friend, nor nothing out
21 of spending a very long amount of time writing that
22 letter.

23 THE COURT: Mr. Kessler, you apparently
24 leafed through this but you missed the essence of the
25 fact that in this he and Julius Klein were together up to

1 hbjw

2 their eyeballs in a kidnapping case. They were up to their
3 eyeballs in some matter involving Baltimore, I didn't quite
4 get into the details but enough to see that they were to-
5 gether in it. He and Papa, as Julius Klein, Sr. was called
6 were close friends for years and years and years and
7 obviously the motivation for this man which I really don't
8 have to reach but the motivation form to help out the Klein
9 family by coming up with some kind of a story here is
10 enormous.

11 You say he has no motive to do this, he had
12 enormous motive to do this. He has been their friends for
13 years. They have entertained at each other's homes.

14 MR. KESSLER: Your Honor, Mr. O'Gorman testified
15 against Mr. Klein in that very case as a government witness.

16 THE COURT: Mr. O'Gorman is a man of many parts
17 at different times I conclude.

18 MR. KESSLER: Perhaps your Honor, but Mr. O'Gorman
19 as your Honor is well aware has not made any of this
20 information known to the petitioner in this action. Indeed
21 it is only by subpoenaeing a random --

22 THE COURT: He made it known to Mr. Jaffe's
23 office according to Mr. Klein.

24 MR. KESSLER: However, Mr. Jaffe is quite clear
25 he has hesitated and has consistently refused to help

1 hbjw

2 Mr. Klein.

3 THE COURT: Mr. Kessler, I am prepared to
4 hear you argue this to the extent you like. I really don't
5 think you need to and I think frankly we have touched
6 on everything that is essential to the Court's determina-
7 tion here and Mr. Clayton, I don't think you need to feel
8 you need to be heard having heard all of this proof, having
9 heard my views.

10 MR. CLAYTON: No, your Honor.

11 THE COURT: I conclude that we have heard
12 nothing from Mr. O'Gorman that would cause me to change
13 my view at all and indeed I have heard nothing except
14 that which indicates that Mr. O'Gorman is a man whom I
15 would not rely upon even if I had something affirmative
16 from him which I have not.

17 Given that, I therefore deny the motion for
18 a new trial which is an addendum I take it to the earlier
19 motion which I had denied previously in an opinion.
20 And my comments here in the courtroom today constitute
21 the Court's findings of fact and conclusions of law
22 sufficient for anybody's purpose.

23 All right.

24 MR. KESSLER: Your Honor, a few ancillary --

25 THE COURT: Given my observations, I will

JULIJS F. KLEIN, JR.,

-against-

Respondent..

OWEN, District Judge.

This is a petition for a writ of habeas corpus
v state prisoner who was convicted of murder in the
first degree, in New York Supreme Court, Westchester County.
The petitioner, Julius F. Klein, Jr., was sentenced to life
imprisonment for the slaying of one Irene Brandt. He
unsuccessfully appealed that conviction both to the
Appellate Division and the New York Court of Appeals upon
the same constitutional grounds which are alleged herein.
Judge Ward of this Court, who was originally assigned
the case, held that the petitioner had exhausted all
available remedies in the Courts of the State within
the meaning of 28 U.S.C. §2254(b) and was therefore, properly

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before this Court. Judge Ward further ordered, pursuant to his memorandum of December 12, 1973, that a hearing be held on Klein's central constitutional claim of a violation of his Sixth Amendment right to the effective assistance of counsel. That claim arises from the following facts.

On February 20, 1969, one William Reuther ("Reuther") was indicted by a Suffolk County Grand Jury for first degree murder, having allegedly killed Irene Brandt in September, 1966. In February 1969, Reuther apparently initiated negotiations with Maurice Nadjari then the Assistant District Attorney in charge of the case. As a result of a conversation with Mr. Nadjari in March, Reuther agreed to testify concerning the events, in return for the prosecutor's agreement to accept a plea of guilty to first degree manslaughter and to recommend a sentence of from two to four years. In March, Reuther testified before the Grand Jury, and on March 22, petitioner was indicted for the same crime.

After petitioner's indictment, both he and Reuther were represented by the same counsel, Bobick & Deutsch, Esqs. Counsel appear to have anticipated that both defendants would be tried together. Although they were incarcerated in separate institutions, counsel visited each of them a number of times. On September 24, 1969, Reuther requested that the Court appoint new counsel to represent him and

pleaded guilty to first degree manslaughter. It appears that this was the first either counsel for the defendants or petitioner knew of Reuther's agreement with the prosecutor. Petitioner's trial was held in October, 1969. At trial, Reuther described his actions as accomplice and petitioner's as planner and wielder of the murder weapon. Petitioner claims prejudice in the presentation of his defense at trial and asserts that there was a prosecutorial intrusion into his attorney-client relationship violating both his Sixth Amendment right to counsel and his Fourteenth Amendment right to due process.

Pursuant to Judge Ward's order I held a four day evidentiary hearing to determine whether Reuther had in fact disclosed any confidential defense plans or strategy to the chief prosecutor.

Petitioner asserts that a per se rule should apply, and that any intrusion into the confidentiality of his attorney-client relationship requires a reversal of the judgment of conviction even without a showing of actual prejudice. That assertion has been rejected by the Second Circuit which has repeatedly required a showing of actual prejudice to the privileged attorney-client relationship. See United States v. Arroyo, 494 F.2d 1316 (2d Cir. 1974); United States v. Mosca, 475 F.2d 1052, 1060-61 (2d Cir.)

cert. denied, 412 U.S. 948 (1973); United States v. Lovano, 420 F.2d 769 (2d Cir. 1970).

Having presided over the hearing and having once again reviewed the minutes thereof, I conclude that there is absolutely no showing of actual prejudice to the relationship between the petitioner and his attorneys.

Both William Reuther and Maurice Nadjari testified at the hearing and both asserted without contradiction, that they never discussed with each other petitioner Klein's defense plans or strategy. I credit their testimony. Reuther specifically testified that neither of his lawyers, Bobick or Deutsch, told him anything about any defense plans whatsoever. Reuther stated that most of his discussions with Bobick and Deutsch, when they visited him in jail, centered on an upcoming and unrelated kidnap case; that concerning his and petitioner's case he was not to worry, counsel "would take care of everything." Upon further questioning Reuther stated that counsel had told him relative to the petitioner's case, "everything is okay, they have no evidence, they will nail Cooke and Watson on the case, they will take the whole bit." Significantly, Reuther testified that it was his fear of retaliation by Klein that caused him to wait as long as possible before discharging Bobick & Deutsch since the minute he did so, Klein would know of his cooperation with the prosecution.

Mr. Nadjari similarly testified that Reuther had never divulged, nor did he, Nadjari, attempt to elicit, Klein's defense plans or strategy during any of their discussions. His testimony, which I credit, was that he was interested in Reuther only as an eye-witness to the murder of Irene Brandt.

Attorneys Bobick and Deutsch, then and now petitioner's attorneys, both stated in general terms that they had discussed the defense with Reuther. I prefer and credit Reuther's specific testimony in this area, and note that in any event, petitioner still would not have sustained his burden of proof since there was no evidence that Reuther in turn disclosed any defense strategy to Mr. Nadjari. Consequently, there was no showing of an actual violation of petitioner's Sixth Amendment right to counsel. I therefore dismiss the petition as to this claim.

Turning to petitioner's other claims, I find them also to be without merit. He claims error in the prosecutor's failure to disclose to counsel an "alleged" deal with Reuther involving dropping a separate charge of possession of stolen property in return for Reuther's testimony against Klein. However, petitioner failed to adduce any evidence of the existence of such an undisclosed "deal" on the hearing.

Petitioner next alleges that the prosecution did not disclose certain statements of witness Stoddard after defense counsel asked for all of such statements. Consequently, petitioner claims he was denied due process of law under Brady v. Maryland, 373 U.S. 83 (1963). Petitioner's reliance on Brady is misplaced. The holding in Brady was limited to evidence that was material to the issue of petitioner's guilt or punishment or both. The undisclosed statements in question here, in the form of quotations from the affidavit of a detective who had interviewed Stoddard, go essentially to the question of Stoddard's credibility and not to the question of petitioner's guilt.

Petitioner next complains of alleged prejudicial remarks in the prosecutor's summation, and in the so called "inquisition of jurors." However, they do not possess the constitutional dimension necessary for review by this Court in a habeas corpus. As was stated in United States v. Fay, 190 F. Supp. 105 (S.D.N.Y. 1961) at p. 107:

Each state is free to adopt its own procedures and rules of evidence in the enforcement of its criminal laws, and these may not be interfered with by the federal courts unless they offend fundamental principles of justice and fair play. It follows that mere errors or mistakes of law committed in the conduct of state criminal trials may not be reviewed by the federal courts; they are empowered to upset a state court judgment of conviction only when the wrong complained of necessarily denied the

defendant a fair trial - in short, that the judgment of conviction is void for lack of due process because of the state's "failure to observe that fundamental fairness essential to the very concept of justice." Absent such a showing, the writ of habeas corpus is not available to review errors in petitioner's trial in the admission of evidence, alleged prejudicial statements in the Court's charge, or in the prosecutor's summation [citations omitted].

For all the foregoing reasons, the petition is dismissed in its entirety.

It is so ordered.

October 15, 1974.

A handwritten signature in cursive script, appearing to read "Ronald T. ...", is written over a horizontal line.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JULIUS F. KLEIN, JR.,

Petitioner,

-against-

HAROLD SMITH, as Superintendent of the
Attica Correctional Facility, Attica,
New York,

Respondent.

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:

:

:

73 Civ. 4277
R.J.W.

This is a petition by a state prisoner for a writ of habeas corpus, together with a motion for an order compelling both the appearance of petitioner before this court and his transfer to a correctional facility close to New York City. For the reasons discussed below, his motion is denied as to the request to transfer; an evidentiary hearing is ordered concerning the merits of the petition for a writ of habeas corpus; and his motion for an order compelling his presence at this hearing is granted.

Petitioner is presently incarcerated in the New York State Correctional Facility at Attica, New York, serving a life sentence upon a conviction for murder in the first degree, in the Supreme Court, Westchester County, Petitioner

appealed the conviction upon the same constitutional grounds alleged herein, and his conviction was affirmed without opinion by both the Appellate Division, Second Department, and the New York Court of Appeals. No petition for certiorari to the Supreme Court of the United States was filed.

A petitioner is required by 28 U.S.C. *2254 (b) to exhaust all the remedies available in the courts of the state before seeking a writ of habeas corpus in a federal court. But since Fay v. Noia, 372 U.S. 391 (1963), this has not been held to require application for a writ of certiorari to the United States Supreme Court. Id., at 435-438. See also, United States ex rel. Ellington v. Conboy, 333 F. Supp. 1318, 1320-1321 (S.D.N.Y. 1971). Petitioner is, thus, properly before this court.

The central constitutional claim arises from the following facts. On February 20, 1969, one William Reuther ("Reuther") was indicted by a Suffolk County Grand Jury for first degree murder, having allegedly killed Irene Branit in September, 1966. In February, 1969, Reuther apparently initiated negotiations with the chief prosecutor. As a result of a conversation with the prosecutor in March, Reuther agreed to "tell the truth" concerning the events, in return for the prosecutor's agreement to accept a plea of guilty to first degree murder (manslaughter) and to recommend a sentence of from two to four years.

In March, he testified before the Grand Jury, and on March 22, petitioner was indicted for the same crime.

After petitioner's indictment, both he and Reuther were represented by the same counsel, Bobick & Deutsch, Esqs. Counsel appear to have anticipated that both defendants would be tried together. Although they were incarcerated in separate institutions, counsel apparently visited each of them to discuss matters relating to the defense. On September 24, 1969, Reuther requested that the court appoint new counsel to represent him and pleaded guilty to first degree manslaughter. It appears that this was the first either counsel for the defendants or petitioner knew of Reuther's agreement with the prosecutor. Petitioner's trial was held in October, 1969. At trial, Reuther described his actions as accomplice and petitioner's ~~planner~~ ^{planner} and wielder of the murder weapon. Petitioner claims prejudice in the presentation of his defense at trial, and asserts that this prosecutorial intrusion into his attorney-client relationship violated both his sixth Amendment right to counsel and his Fourteenth Amendment right to due process. In the judgment of this court, this is not a frivolous claim. See U.S.A. v. DeBerry and Edwards, Docket Nos. 73-1283, 73-1353 (2nd Cir., Nov. 7, 1973).

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Respondent argues that the petition should be denied without an evidentiary hearing because the matters alleged were fully and fairly adjudicated in the state courts. Were this true, it would be persuasive, but not dispositive.

"In all other cases where the material facts are in dispute, the holding of such a hearing is in the discretion of the district judge. . . In every case he has the power, constrained only by his sound discretion, to receive evidence bearing upon the applicant's constitutional claim. . . (H)e may not defer to (the state court's) findings of law".
Townsend v. Sain, 372 U.S. 293, 318 (1963)

In this case, where the facts pertaining to petitioner's claim that his rights to assistance of counsel and to due process of law were abridged are not entirely clear, where it does not appear that the state courts, at the time of the appeal, remanded for an evidentiary hearing into these allegations, and where their decisions were rendered without opinion, in the judgment of this Court an evidentiary hearing is desirable and not violative of sound principles of federalism.

In addition, petitioner alleges several instances of prosecutorial misconduct during the trial which he claims constitute reversible error. Since the record in the case contains the facts necessary to determine these issues, these allegations are beyond the scope of the evidentiary hearing to be held here; after the hearing, all claims will be decided simultaneously.

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Petitioner's presence at this hearing is required, since there are questions of fact to be determined. See Walker v. Johnston, 312 U.S. 275 (1941); United States ex rel. Griffin v. McMann, 310 F. Supp. 72 (E.D.N.Y. 1970); see also, Developments - Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1189 (1970). Consequently, his motion for an order compelling his presence at this hearing is granted.

The motion to compel his transfer to another correctional facility is denied. Whether a prisoner in the state correctional system should be located at one institution rather than another is a matter of prison administration within the discretion of state authorities, and the federal courts will interfere with their judgment only upon a showing of the most serious infringement of basic constitutional rights. See, e.g., People of the State of New York v. Follette, 254 F. Supp. 887 (S.D.N.Y. 1966). Petitioner's convenience in discussing his case with counsel who are already fully familiar with the relevant facts does not warrant such intrusion into matters within the province of the state to control.

Accordingly, the Court grants an evidentiary hearing into petitioner's claimed deprivation of his right to counsel and to due process, arising from the facts briefly set forth herein. Petitioner's motion to counsel his transfer is denied; his motion for an order compelling his presence at this hearing is granted.

Settle order on notice.

Dated: December 12, 1973

U. S. D. J.